the master liable. It was accordingly submitted that, on the evidence, the court would be fully justified in coming to the conclusion that the salesman was employed "under a contract of service by somebody". Carrying this argument a stage further, it was finally contended that, while control of the salesman was in practice exercised by the manager, the power of control resides ultimately in the company. With respect, it seems to me that this argument confuses "authority" with "power". The former applies to the legal relationship existing in fact between principal and agent, that is to say, it looks to the agreement between them for what the agent may or may not do. "Power", on the other hand, is concerned with third parties, who are brought into legal relations with the principal through the agent, whose acts bind the principal if the latter is considered to have held him out as invested with the authority believed in by the third party acting on the faith thereof, even though such belief was erroneous. In my judgment, construing a "contract of service" in section 2 of the Ordinance does not require us to go beyond ascertaining whether such a contract exists or not, to the extent of exploring the wider field of an employer's liability for the unauthorised acts of putative agents. If I have not erred seriously I think what I have just stated was the substance of the board's case.

With all respect, the short answer is that, whether there was a contract of service between salesman and manager or between salesman and company is, as I said before, purely a question of fact. The truth is that, in the nature of things, the two contracts cannot simultaneously co-exist. It may be that in law, the company could in certain circumstances, be liable for the acts and defaults of the salesman, but the ground of liability in such a case is not based on the actual existence of a contract of service, but on the principle of "ostensible authority" and "holding out", which naturally postulates that superior evidence of the employer's liability, namely, the contract of service, was non-existent. In such cases the fact that no such contract exists does not avail the employer because a notional contract is implied by law merely in order that an employer shall not evade liability to a third party for the act of the putative servant acting with ostensible authority. In other words, liability rests on a legal fiction which, merely because it is accepted, does not thereby become elevated to the status of a fact.

Before I conclude, I think it is not out of place to refer to the recent English case of *Allen* v. *Thorn Electrical Industries Ltd.*,[5] arising out of the "wage freeze" in July 1966, where contractual claims for wage increases fell to be considered in the light of restrictive legislation. In that case the word "paid" in sections 28, 29 and 30 of the Prices and Incomes Act, 1966 was construed in the manner which I think "contract of service" in section 2 of the Employees Provident Fund Ordinance 1951 should also be construed. As Lord Denning M.R. said:—

> "Taken literally. the word 'paid' does mean actually paid in cash. It means the money which the man receives in his pay packet. That is how we were invited to construe it here. The draftsman of this Act was, it was suggested, a learned pedant who used words with meticulous accuracy. I decline to accept this invitation. We are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them."

And this was what Danckwerts L.J. said:—

> "These statutory provisions are penal and are designed to interfere with rights of contract and the pre-existing legal position of free citizens of this country. Well-established principles, therefore apply to the situation. Existing legal rights are not to be taken away except by clear words in the statute. If two constructions are possible, the construction which produces unreason and hardship is to be avoided, and the construction which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred."

Finally, there was the express provision in clause 5(f) that the managers were to be "solely responsible" for all payments under the Employees Provident Fund Ordinance. This should be the most cogent ground for dismissing this appeal because I see no reason why the board should be entitled to dictate who should pay the contributions when the parties responsible have already agreed that one, but not the other, should be liable.

I would dismiss this appeal with costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Shearn, Delamore & Co.*

PUBLIC PROSECUTOR v. YUVARAJ

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) February 19, 1968]

[K.L. — Criminal Reference No. X. 1 of 1967]

Bribery and Corruption — Presumption of corruption against accused — Degree of proof required to rebut presumption — Whether on balance of probabilities or beyond reasonable doubt — Prevention of Corruption Act, 1961, ss. 4(a) and 14.

Criminal Law — Evidence — Burden of proof — Corruption — Gift to public servant — Offence — "Unless the contrary is proved" — Prevention of Corruption Act, 1961, ss. 4(a) and 14.

Evidence — Burden of proof — Quantum of proof required of the defence — Evidence Ordinance, 1950, ss. 3 & 105.

This was a reference to the Federal Court on the question of law as to the degree of proof necessary to rebut a statutory presumption raised against an accused person. Under section 14 of the Prevention of Corrup-

tion Act, 1961, once it has been proved that a person prosecuted under section 4(a) of the Act has received any non-legal gratification, a presumption of corruption is raised against him. The question was whether the burden on the accused person is discharged by a defence which is reasonable and probable or a defence which is so probable that a prudent man would act on a supposition that it exists.

Held: where either by statute or by common law, some matter is presumed against an accused person, the burden of rebutting the presumption may be discharged by a defence which is reasonable and probable. Section 3 of the Evidence Ordinance does not affect the quantum of proof.

Per Curiam: "If 'proof' were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the quantum of proof required of the defence and that laid on the prosecution. We do not think that is the law."

R. v. *Carr-Briant* (7) followed. *Saminathan* v. *Public Prosecutor,*(1) not followed.

Cases referred to:—

(1) *Saminathan* v. *Public Prosecutor* [1955] M.L.J. 121 at p. 124.

(2) *Public Prosecutor* v. *Gurubachan Singh* [1964] M.L.J. 141 at p. 144.

(3) *Dhanvantrai* v. *State of Maharastra,* A.I.R. 1964 S.C. 575 at p. 579.

(4) *State of Madras* v. *Iyer,* A.I.R. 1958 S.C. 61 at p. 65.

(5) *State of Gujarat* v. *Madhavbhai,* A.I.R. 1964 Gujarat 206.

(6) *Deonath Dudriath* v. *State of Maharastra,* A.I.R. (1967), Bom. 1.

(7) *R.* v. *Carr-Brant* [1943] K.B. 607 at p. 612.

(8) *Otto George Gfeller* v. *The King,* A.I.R. 1943 P.C. 211.

(9) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 at p. 481.

(10) *Parker* v. *R.* [1964] 2 All E.R. 641 at p. 652F.

(11) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147.

(12) *Azro* v. *Public Prosecutor* [1962] M.L.J. 321 at p. 322.

(13) *Liew Kaling* v. *Public Prosecutor* [1960] M.L.J. 306.

(14) *Looi Wooi Siak* v. *Public Prosecutor* [1962] M.L.J. 337.

(15) *Wong Chooi* v. *Public Prosecutor* [1967] 2 M.L.J. 180 at p. 181.

FEDERAL COURT.

Ajaib Singh (Senior Federal Counsel) for the applicant.

D. R. Seenivasagam for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: The question of law referred to this court pursuant to the provisions of section 66 of the Courts of Judicature Act, 1964 is as follows:—

"Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act, the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable *or*

whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (section 3 Evidence Ordinance)."

The facts are of little significance. Briefly, a trap set by a *Chee Fah* lottery operator for a police inspector resulted in his being found in possession of $250 of marked money. The defence claimed that it was a plant, the money being delivered by the agent provocateur himself on the pretext that it was towards repayment of a debt which the accused had been requested by and on behalf of a brother-officer to hand over to the creditor for goods sold. In an admirable and well-reasoned judgment the learned president of the sessions court, Mr. Sachithanandan, found the agent provocateur to be a witness wholly unworthy of credit, that in respect of the accused's alleged corrupt motive there was no corroboration of the evidence of this prosecution witness and that the court accepted the accused's explanation, not only "as being probable *and credible* in all the circumstances of the case" but also as "being consistent and compatible with the superior probability of his innocence." In the result the accused was acquitted. An appeal by the public prosecutor was dismissed by Ali J., who affirmed the decision of the learned president and subsequently also dismissed an application by the public prosecutor for a reference to this court of the question of law above set out. Upon a further application made unto this court on October 7, 1967 it was decided that, by reason of a conflict of judicial authority on the question of law arising in this case, it was proper that the reference should be entertained in accordance with the provisions of subsection 6(a) of section 66 of the Act of 1964. We now pronounce our decision on such question.

Learned senior federal counsel has called our attention to a number of authorities on the standard of proof required of the defence where, as here, under section 14 of the Prevention of Corruption Act, 1961, the phrase "until the contrary is proved," reverses the normal onus of proof by throwing it on the defence instead to negative a statutory presumption.

In *Saminathan* v. *Public Prosecutor* (1) Buhagiar J., in a customs case, said:—

"The fundamental principle in criminal cases is that there is a burden on the prosecution, which never shifts to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is sufficient if he raises a doubt in the prosecution case and this he may do by 'disproving' a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists.

The facts on which the defence rely must however, be 'proved' and they are proved not by showing merely a possibility that such facts exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case."

xxx xxx xxx

"In this case *(Carr-Briant)* the burden of proof on the accused was held to be the persuasive burden and that such burden was discharged by evidence to satisfy the jury of the probability of the existence of the fact which the statute requires him to prove.

In view of the Evidence Ordinance, 1950, I do not see how 'proved' in any statutory presumption can mean anything but 'proved' as defined in that Ordinance. Whatever view one may take of the policy of the legislation, there is also some policy in giving words a consistent meaning and that is hardly done if 'proved' is given a different interpretation from that in the Evidence Ordinance, 1950."

We would observe that the *ratio decidendi* of the learned judge is to be found in the last sentence quoted above.

However, in a later case, almost a decade later, *Public Prosecutor* v. *Gurubachan Singh* [2] Hepworth J. expressed a different view, thus:—

"As I indicated during the course of the argument, in my opinion the burden of proof under section 14 of the Prevention of Corruption Act, 1961, is the *Carr-Briant* burden of proof and not the *Saminathan* burden of proof. That is to say, the burden on an accused person under section 14 of the Prevention of Corruption Act, 1961, is no higher than that on a party to a civil action to prove his case on the balance of probabilities."

We are much indebted to learned senior federal counsel, Mr. Ajaib Singh, for bringing to our attention the 1962 decision of the Supreme Court of India, on an appeal from the High Court of Bombay, in *Dhanvantrai* v. *State of Maharastra.*[3] In that case the judgment of the court was delivered by Mudholkar J. concerning the effect of section 4(1) of the Prevention of Corruption Act of India, 1947 (which is in *pari materia* with section 14 of the Malaysian Act) as follows:—

"Mr. Chari contends that upon the view taken by the High Court it would mean that an accused person is required to discharge more or less the same burden for proving his innocence which the prosecution has to discharge for proving the guilt of an accused person. He referred us to the decision in *Otto George Gfeller* v. *The King,*[8] and contended that whether a presumption arises from the common course of human affairs or from a status there is no difference as to the manner in which that presumption could be rebutted. In the decision referred to above the Privy Council, when dealing with a case from Nigeria, held that if an explanation was given which the jury think might reasonably be true and which is consistent with innocence, although they were not convinced of its truth, the accused person would be entitled to acquittal inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. That, however, was a case where the question before the jury was whether a presumption of the kind which in India may be raised under section 114 of the Evidence Act could be raised, from the fact of possession of goods recently stolen, that the possessor of the goods was either a thief or receiver of stolen property. In the case before us, however, the presumption arises not under section 114 of the Evidence Act but under section 4(1) of the Prevention of Corruption Act. It is well to bear in mind that whereas under section 114 of the Evidence Act it is open to the court to draw or not to draw a presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the court to draw such presumption, under sub-section (1) of section 4, however, if a certain fact is proved, that is, where any gratification (other than legal gratification) or any valuable thing is proved to have been received by an accused person the court is required to draw a presumption that the person received that thing as a motive or reward such as is mentioned in section 161, I.P.C. Therefore, the court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to that person to show that though that money was not due to him as legal remuneration it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted."

The Indian Supreme Court appears to have adumbrated in 1957 this same view of the interpretation of section 4 when it expressed the opinion (which appears to have been *obiter*) that there was a "special burden of proof under section 4": see *State of Madras* v. *Iyer.*[4]

Its 1962 decision, binding on the High Courts, has subsequently been followed in *State of Gujarat* v. *Madhavbhai* [5] and *Deonath Dudriath* v. *State of Maharastra.*[6]

We have carefully studied these judgments of the Indian Supreme Court, but in neither of them was there any reference to the well-known decision of the English Court of Criminal Appeal in *R.* v. *Carr-Briant,*[7] showing in what manner that decision on precisely the same question of law was considered as in any way distinguishable. It will be observed, on the other hand, that the Privy Council decision in *Gfeller* [8] was cited and carefully distinguished.

Carr-Briant was a decision given by Humphreys J. (in a court which also comprised Viscount Caldecote C.J. and Lewis J.) after an exhaustive and meticulous examination of relevant authorities on the onus of proof and the conclusion which the Court of Criminal Appeal came to was expressed in the most unequivocal terms as follows:—

"In our judgment, in any case where, either by statute or at common law, some matter is presumed

against an accused person 'unless the contrary is proved,' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

This classic judgment, so far as we have been able to advise ourselves, has been accepted without any breath of criticism throughout all common law countries since its pronouncement a quarter-century ago. It was not even expressly dissented from by the Supreme Court of India. Therefore, with the utmost respect, we would prefer the English decision in this conflict of judicial opinion. Our reasons may be stated briefly without any metaphysical indulgence in abstruse semantics. In the first place, it is undeniable that the Prevention of Corruption Acts of India and Malaysia were fashioned from the same mould, after the English Act. In the English Act the phrase "until the contrary is proved" is one with quite a hoary history. In England "proof" and "proved" in the administration of criminal justice has an accepted meaning under the common law too well-known to admit of argument and erosive distinctions in this day and age. The mere fact that section 3 of the Indian Evidence Act (and ours) defines and explains how and when a fact is said to be "proved" does not, and should not, in our opinion affect the *quantum* of proof in India or Malaysia, whether as regards the case for the prosecution or defence, any more than it can do so in England, from whose legislation the term "until the contrary is proved" was borrowed whole. If *Dhanvantrai* gave the true interpretation of those words it follows that they have a meaning and effect which is radically different from how they are construed in England and in other jurisdictions where the common law applies. And if we were to follow *Dhanvantrai* we should have to go the whole way, applying the same construction to all manner of legislation in which the same words appear.

In the second place, the burden that rests on the prosecution to prove its case beyond all reasonable doubt is a fundamental principle. As Lord Sankey said in *Woolmington's* case:—[9]

"If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge, or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

With the greatest respect it seems to us that the distinction between "onus" in the two shades of meaning it possesses has not been drawn with sufficient precision in *Dhanvantrai*. It may mean the *burden of proof* in the sense that it is used, for instance, in section 101(2) of the Evidence Act, "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Then there is section 103 which contains a proviso referring to reversal of this burden. On the other hand, onus may mean the *quantum of proof*, as that which is invariably required of the prosecution: see the passage in *Woolmington* above.

If we are not in error in reading the judgment of Mudholkar J., the quantum, in the sense of weight, of evidence required of a prisoner to answer the prosecution case differs according as a presumption raised against him is one of fact, (section 114) or is one of law, although admittedly rebuttable. As the learned judge put it: "The burden resting on the accused person in such a case (i.e. section 4 of the Prevention of Corruption Act) *would not be as light* as it is where a presumption is raised under section 114 of the Evidence Act." We regret, with all respect, that we cannot go along with that reasoning because, to take an example, there seems to us to be a clear contradiction presented by section 105 of the Evidence Ordinance as follows:—

"105. When a person is accused of any offence, the burden of proving the existence of circumstances, bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him and the court shall presume the absence of such circumstances."

Under this section there is an equally mandatory, though rebuttable, presumption but again so far as we are aware, the burden on the defence is discharged, for instance, in the case of any of the five special exceptions raised to the offence of murder (see section 300 of the Penal Code), by evidence sufficient to the degree only of showing that the explanation may reasonably and probably be true. There is such a plethora of authorities which bear out the proposition so stated that citations from English, Indian or Malaysian cases are superfluous: see *Parker* v. *Reginam.*[10]

Is the effect of section 3 of the Evidence Ordinance as to proof such as to require that, beyond an explanation which is both reasonable and probable, the defence would have to go further and, in the words of Mudholkar J., "show that the explanation is a true one?" The courts in Malaysia have consistently followed the principle enunciated in *Carr-Briant* since long before that case: see *Chia Chan Bah* v. *The King* [11] and *Azro* v. *Public Prosecutor.*[12] These cases and others, such as *Liew Kaling* v. *Public Prosecutor,*[13] *Looi Wooi Siak* v. *Public Prosecutor,*[14] have already anticipated our answer to this reference. In the last-mentioned case, Thomson C.J., after quoting from Lord Sankey's judgment in *Woolmington,* said:—

"That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of that gold."

The most recent pronouncement on this very point is that of Azmi C.J. in *Wong Chooi* v. *Public Prosecutor*:—(15)

"In my view the law is quite clear, that where a burden is placed on an accused person to prove anything, by statute or common law, that burden is only a slight one and that this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence."

After all, as Buhagiar J. himself said in *Saminathan*, the facts on which the defence rely are "proved, not by showing a mere possibility that such facts exist, but by showing the probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case." This standard is clearly different from and appreciably lower than that required of the prosecution. The presumption under section 14, be it emphasised, is a rebuttable one and if the explanation offered is one which may very well be true, how can it be said that the case for the prosecution, at the close of the trial, has been proved beyond reasonable doubt? A proper evaluation of the evidence relied on by the defence is vastly different from the imposition of a distinctly heavier onus. If "proof" were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the quantum of proof required of the defence and that laid on the prosecution. We do not think that is the law.

To conclude, with special reference to the instant case, the finding of fact of the learned president was not merely that the explanation was "reasonable and probable", which would have sufficed, but that it was "probable and credible" as well as "compatible with the superior probability of his innocence." Clearly, therefore, his decision was right in law and ought to be reaffirmed in this court as it had been affirmed by Ali J.

Decision of the Sessions Court re-affirmed.

Solicitors: *S. Seenivasagam & Sons.*

SELANGOR OMNIBUS CO. LTD. v. TRANSPORT WORKERS' UNION, MALAYA & ORS.

[F.C. (Ong Hock Thye F.J., Raja Azlan Shah and Pawan Ahmad JJ.) February 20, 1968]

[K.L. — Federal Court Civil Appeal No. X. 12 of 1967]

Practice and Procedure — Certiorari — Discretionary order — Failure of party to raise objection at trial.

Practice and Procedure — Jurisdiction of tribunal — Failure to challenge — Whether disentitled appellant to apply out of time.

This was an appeal from the decision of Gill J. ([1967] 1 M.L.J. 280) dismissing an application for an order of *certiorari* to quash the proceedings and award of the Industrial Arbitration Tribunal. The appointment of members of the tribunal had expired on December 31, 1965, but no objection was taken by the appellants to the hearing of the dispute.

Held, dismissing the appeal: the jurisdiction of the tribunal was unquestioned for so long after it could have been challenged by the appellants. This disentitled the appellant from applying for an order of *certiorari* and as the remedy of *certiorari* was wholly discretionary, the court could refuse to make the order.

Cases referred to:—

(1) *Thomas* v. *Marconi's Wireless Telegraph Co. Ltd.* [1965] 1 W.L.R. 850, 852.

(2) *R.* v. *Williams & Ors. ex parte Phillips* [1914] 1 K.B. 608, 613, 614.

(3) *Chop Wong Soong Co.* v. *Khoo Hean Kee* [1964] M.L.J. 410.

FEDERAL COURT.

Ng Ek Teong (*Ponniah* with him) for the appellants.

J. Puthucheary for the 1st respondent.

Au Ah Wah (Senior Federal Counsel) for the 2nd and 3rd respondents.

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal against the decision of Gill J. dismissing an application for an order of *certiorari* to remove into the High Court for the purpose of their being quashed the proceedings and award of the Industrial Arbitration Tribunal Case No. 1 of 1965, between Selangor Omnibus Company Limited and the Transport Workers' Union, Federation of Malaya*.

In a nutshell, the case for the appellants is that the tribunal was not lawfully constituted after December 31, 1965 and that, for this very reason its proceedings were conducted without any jurisdiction, rendering its award null and void.

This appeal raises the rather complex question of law whether the particular saving clause contained in a statutory instrument passed in substitution of and repealing earlier legislation has the effect of validating all things done in purported compliance with the provisions of the repealed legislation and to what extent.

It would *prima facie* appear that there are merits in the contention of counsel for the appellants. In my view the principle which may be said to apply is this: unless the acts done were of unimpeachable validity under the repealed law itself, the same cannot be validated simply because of the saving clause in the substituted law, which in the instant case reads:—

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* See [1967] 2 M.L.J. lii.